Page 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-- x

CONSIST SOFTWARE SOLUTIONS, INC., f/k/a

CONSIST INTERNATIONAL, INC.,

                   Plaintiff,

                            Case number

    -against-   07 CV 7047

                            (CM)(FM)

SOFTWARE AG, INC. and SOFTWARE AG,

                Defendants.

-- x

DEPOSITION of DAVID MacSWAIN, taken
pursuant to Notice, held at the offices of
Duane Morris, LLP, 1540 Broadway, New York, New
York, on November 20, 2007, at 9:30 a.m.,
before Fran Insley, a Notary Public of the
States of New York and New Jersey.

Capital Reporting Company
CONFIDENTIAL

Page 213

1   A.   I don't know what component of that

2   product is third party and what has been added

3   by Software AG Mr. Shaffer.   I just don't know

4   the composition of that technology.

5   Q.   Mr. MacSwain, on page 8 of your

6   report you have a title, "Confusion in The

7   Territory"?

8   A.   Yes.

9   Q.   Can you explain to me what the basis

10 of your opinion is that clients in the

11 territory, we are referring to the seven

12 countries that are Consist's territory, every

13 basis that you have, every factual basis that

14 you have for your conclusion that there is

15 confusion in the territory with respect to

16 Natural and Adabas as not being Software AG

17 products?

18   Do you understand the question?

19   A.   Could you repeat that, please.

20   Q.   Yes.   I'll withdraw that and ask a

21 better one.

22   Can you tell me every factual basis

Capital Reporting Company
CONFIDENTIAL

Page 214

1   you have for the conclusion that you express in

2   your report that there is confusion in

3   Consist's territory with respect to Natural and

4   Adabas as being associated with Software AG or

5   not being associated with Software AG?

6   A.   I think it's a two-part answer,

7   Mr. Shaffer. Part 1 is that I was unable to

8   find any documents, I think, with the exception

9   of the one exhibit in this report where Consist

10   Natural/Adabas and Software AG were mentioned

11   in documents in the public domain that were

12   available in the territory. These were Consist

13   documents now, so we couldn't find anything

14   that positioned Natural/Adabas as the brands of

15   Software AG resold by Consist, if that makes

16   sense. So the absence of material collateral.

17   Q.   Do you have any affirmative

18   testimony that there is any customer in the

19   territory who does not know that Adabas and

20   Natural are products of Software AG?

21   A.   Yes, I can tell you -- part 2 to my

22   answer is that I can tell you that in the 2003,

Capital Reporting Company
CONFIDENTIAL

Page 215

1   2006 era when I was running Zulu, that we

2   were -- we were, I guess, struck by the fact

3   that seemingly no one we talked to in Brazil

4   knew the Software AG brand. They knew

5   Natural/Adabas and they knew that brand or

6   those brands very well, but the identification

7   of those brands was with Consist.

8   Q.   Do you have any understanding of why

9   that is true in the territory?

10   A.   Not exactly, no.

11   Q.   Do you know what happens if you

12   Google Adabas or Natural? Do you know what

13   site you are taken to?

14   A.   Well, I mean, the Google answer

15   would be multiple pages, typical 10,000-hit

16   kind of thing.

17   Q.   But it would take you to the

18   Software AG web page, wouldn't it?

19   A.   Typically, those are sponsored

20   links.

21   Q.   Isn't it also true that when a

22   client contracts for a Software AG product

ab8ed96c-4f4d-4749-a274-a4f074b9d76f

Capital Reporting Company
CONFIDENTIAL

Page 216

1   through Consist, that the client gets user

2   manuals and marketing material --

3   MR. BASINGER: Objection. Calls for

4   speculation.

5   Q.   Do you know one way or the other?

6   A.   I don't, sir. I would assume there

7   would be documentation probably on line.

8   Q.   Have you ever looked at the

9   documentation?

10   A.   No, sir.

11   Q.   If I told you that the documentation

12   that is on line specifies that it's a Software

13   AG product, would your opinion change as to

14   whether there is confusion?

15   A.   I don't think that would change my

16   opinion. I'm going on what we experienced in

17   that 2003, 2006 era with Zulu.

18   Q.   Can you name every customer you can

19   remember who did not know that Natural/Adabas

20   was a Software AG product?

21   A.   No, I can't.

22   Q.   Can you name any single one?

ab8ed96c-4f4d-4749-a274-a4f074b9d76f

Capital Reporting Company
CONFIDENTIAL

Page 217

1   A.   No, not off the top of my head.

2   Q.   You say in your report, "I have been

3 privy to numerous reports from Consist

4 customers in Brazil that they were unaware that

5 Natural/Adabas is a Software AG brand."

6   You cannot name a single customer of

7 Consist and Brazil that thinks that sitting

8 here today?

9   A.   Not off the top of my head, no.

10   Q.   Then you say, "I have also conducted

11 an Internet search and reviewed a number of

12 public Consist documents which do not contain

13 any reference to Software AG as being the brand

14 owner of Natural/Adabas," correct?

15   A.   That was my part 1 answer, yes.

16   Q.   And when I asked you whether you

17 went on line to get the publicly available user

18 or marketing materials for Natural/Adabas,

19 whether those materials on line specified that

20 those products were Software AG, and you said

21 you weren't aware one way or the other,

22 correct?

ab8ed96c-4f4d-4749-a274-a4f074b9d76f